The Honorable Douglass North
Oral Argument: February 22, 2013, 1:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 19, Plaintiff, vs. CITY OF SEATTLE, et al., Defendants.	No. 12-2-34068-4 SEA CITY OF SEATTLE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO LOCAL 19'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

This case presents a single, narrow legal issue: is the Memorandum of Understanding ("MOU")[1] between Seattle, King County, and ArenaCo an "action" within the meaning of the State Environmental Policy Act ("SEPA")[2] such that SEPA review was required before the parties could enter the MOU? The answer is no. SEPA's definition of "action" makes clear that SEPA requires environmental review before a government agency *decides*. The MOU contains *no decision* to proceed with an arena proposed for the City's SODO neighborhood. Rather, the MOU reserves the City's decision whether to proceed for a later time—a time following SEPA review—and leaves the City free to decide not to proceed after considering the results of that review. Under SEPA's relevant provisions, the MOU was a permissible step for the parties to take prior to SEPA review. Local 19's arguments to the contrary are irrelevant diversions lacking a foundation in law.

Ultimately, the Court need not reach the merits, because Local 19 lacks standing to bring this lawsuit. Given that the MOU makes no decision to proceed with a SODO arena, Local 19 can only speculate about the injuries its members would suffer from such an arena. Local 19 therefore cannot demonstrate the concrete "injury in fact" needed to prove its standing.

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[1] Although Local 19 also challenges the Interlocal Agreement ("ILA"), *see* Complaint, ¶ 38, Local 19's substantive complaint is with the MOU, which remains the focus of its motion for summary judgment. For the sake of simplicity and because the analysis is the same for both the MOU and ILA, this brief will refer only to the MOU.

[2] "SEPA" as used in this brief includes both RCW Chapter 43.21C and the state and local rules that implement it. SEPA authorizes the Department of Ecology to develop SEPA rules, WAC Chapter 197-11, which courts must accord "substantial deference." RCW 43.21C.095, .110. SEPA also authorizes local jurisdictions to adopt SEPA rules consistent with the state rules. RCW 43.21C.120(3), .135. The City's rules are virtually identical to the language of the Ecology rules. For the Court's convenience, this brief will cite to the WAC where the City's rules are identical, and to the Seattle Municipal Code ("SMC") in the one instance where the City's rules differ. The Appendix contains the text of the only SMC provision cited in this brief.

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Because this case presents no genuine issue as to any material fact and the City is entitled to judgment as a matter of law, the City respectfully asks the Court to enter summary judgment in favor of the defendants and dismiss this lawsuit. *See* CR 56(c).

II. STATEMENT OF FACTS

Local 19's Statement of Facts contains significant inaccuracies. Equally important, most of Local 19's factual contentions are irrelevant to the narrow legal issue before the Court. Although the MOU is a binding agreement, it actually obligates the parties to carry out only a small subset of the activities it addresses. Most of the MOU's terms become obligations of the parties only upon the future occurrence of various contingencies. The most important of these is a *future* decision by the City and County—to be made only *after* consideration of the environmental impacts analyzed through SEPA review—whether to invest in a SODO arena.

The fundamental structure of the MOU is evident from its language. ArenaCo is proposing to develop and operate an arena in SODO (called the "Project" in the MOU). *See* MOU, Recitals, Declaration of Peter Goldman, Ex. K. At its sole expense, ArenaCo will seek the permits and approvals required for the arena and will fund the required SEPA review. *See* MOU, ¶ 4. The MOU addresses SEPA in great detail, making clear that the City and County may not and will not commit to the arena until after each has been able to consider the impacts analyzed through SEPA review:

> **SEPA.** The Parties acknowledge that the Project is subject to review and potential mitigation under various laws, including the State Environmental Policy Act, Chapter 43.21C of the Revised Code of Washington ("RCW"), and the state and local implementing rules promulgated thereunder (collectively, "SEPA"). *Before the City and County Councils consider approval of the Umbrella Agreement and any Transaction Documents, the City and County will complete a full SEPA review*, including consideration of one or more alternative sites, a comprehensive traffic impact analysis, impacts to freight mobility, Port terminal operations, and identification of possible mitigating actions, such as improvements to freight mobility, and improved pedestrian connections between

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> the Arena and the International District light rail station, the Stadium light rail station, the SODO light rail station, and Pioneer Square. The City and County anticipate that alternatives considered as part of the SEPA review will include a "no action" alternative and an alternative site at Seattle Center. *The City or County may not take any action within the meaning of SEPA except as authorized by law*, and nothing in this MOU is intended to limit the City's or County's exercise of substantive SEPA authority. Consistent with Section 4 of this MOU, ArenaCo will reimburse the City for the costs incurred by the City as part of the SEPA review and will be responsible for funding any required mitigation imposed through SEPA substantive authority.

MOU, ¶ 5 (emphasis added).

The MOU acknowledges that the City and County might opt to provide public financing for a SODO arena. *See* MOU, ¶ 10. This would involve the City purchasing the arena site from ArenaCo and ground leasing the site to ArenaCo for at least 30 years. *See* MOU, ¶¶ 8, 9. ArenaCo would construct the arena building, which the City and County would lease (with an option to purchase) and then sublease (or lease) back to ArenaCo. *See* MOU, ¶ 9. The total amount to be paid by the City and County to ArenaCo would be $200 million, subject to various reductions. *See* MOU, ¶ 10. The MOU contains a variety of financial and related business terms that would govern the parties' relationship if the City and County opt to proceed.

Crucially, the obligations of the City and County to commit public financing are expressly limited by numerous conditions precedent, including *future* decisions by the City and County to proceed only after considering the environmental impacts disclosed through SEPA review and determining whether the arena is appropriate in light of those impacts:

> **City/County Conditions Precedent.** The obligations of the City and County under this MOU to commit Public Financing are expressly conditioned on the following conditions precedent:
>
> ....
>
> **b. SEPA and Permitting.** *Before the Umbrella Agreement and Transaction Documents may be authorized* as described in Section 24.e below, (i) SEPA review associated with any City or County actions as

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> described in Section 5 of this MOU has been completed through issuance of a Final Environmental Impact Statement; (ii) the master use permit and all other permits required for construction of the Project have been obtained; (iii) *the City and County and their respective councils have considered the SEPA review in connection with their respective actions and have determined whether it is appropriate to proceed with or without additional or revised conditions based on the SEPA review*; and (iv) any challenges to the Project have been resolved in a manner reasonably acceptable to the Parties.

MOU, ¶ 24.b (emphasis added). Additional conditions precedent to the City's and County's obligations to commit public financing include decisions by the City and County on whether it is appropriate to proceed based on the information provided by a required economic impact analysis, and ArenaCo's securing an NBA franchise. *See* MOU, ¶¶ 24.d and g.

The City, County, and ArenaCo executed the MOU as of December 3, 2012.

III. STATEMENT OF ISSUES

A. Should the Court dismiss this lawsuit without reaching the merits because Local 19 lacks standing, where Local 19 is able only to speculate about whether the MOU will injure its members?

B. Should the Court dismiss this lawsuit because the MOU is not an "action" under SEPA requiring prior SEPA review, where the MOU expressly reserves a City decision whether to proceed with a SODO arena until after SEPA review and leaves the City free to decide not to pursue a SODO arena?

IV. EVIDENCE RELIED UPON

This motion relies on the declarations submitted by the parties and the other pleadings and papers on file with the Court.

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V. ARGUMENT

A. The Court should dismiss this lawsuit without reaching the merits because Local 19's inability to demonstrate non-speculative "injury in fact" deprives Local 19 of standing.

Local 19 lacks standing to maintain this lawsuit because Local 19 is able only to speculate about whether the MOU will injure its members. Only a "person aggrieved" by an agency action may bring a judicial appeal under SEPA. RCW 43.21C.075(4). To determine whether a petitioner has standing as a "person aggrieved," Washington courts hold that "the petitioner must allege an 'injury in fact,' *i.e.*, that he or she will be 'specifically and perceptibly harmed' by the proposed action." *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992); *see also Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994). To show "injury in fact," the petitioner:

> must present facts that show he will be adversely affected by [the agency's] decision not to prepare an EIS. *His "affidavits [must] collectively demonstrate sufficient evidentiary facts to indicate that he will suffer an 'injury in fact'".* Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. *If the injury is merely conjectural or hypothetical, there can be no standing.*

Trepanier, 64 Wn. App. at 383 (citations omitted, emphasis added).

Local 19 cannot demonstrate "injury in fact." Local 19's allegation of injury is still fundamentally "conjectural" and "hypothetical" for one simple reason: the MOU contains no decision that binds the City to proceed with the proposed arena in SODO. Under the terms of the MOU, the City's decision whether to invest in a SODO arena is to be made later, following the completion of SEPA environmental review and an assessment of whether pursuing the arena is appropriate in light of the impacts disclosed. Local 19 can only speculate whether, following completion of SEPA review, the City will decide to proceed with a SODO arena. Washington

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courts have declined to find "injury in fact" for purposes of SEPA standing under such circumstances. *See Harris v. Pierce County*, 84 Wn. App. 222, 231-32, 928 P.2d 1111 (1996) (rejecting standing to press a SEPA challenge of a trail proposal where locations of trail acquisitions had not yet been determined); *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994) (a property owners' organization failed to show injury in fact where affidavits merely asserted conclusions about the anticipated future effects of county-wide planning).

Local 19 attempts to evade this problem by contending that the provisions of the MOU will create irreversible momentum in favor of siting the arena on the SODO site. *See* Complaint, ¶ 2. To support its momentum argument, Local 19 points to provisions of the MOU identifying "a specific location for the arena in SODO…, the commencement of a process for the city and county to co-design the arena on this site, and extensive financial transaction terms that apply only to the SODO site." *Id.* None of these provisions creates contractual momentum toward a decision to proceed with a SODO arena—again, the MOU makes no such decision and specifically postpones one until after consideration of the results of environmental review.

Perhaps recognizing this weakness, Local 19 focuses on political momentum, highlighting factors external to the MOU, including ArenaCo's statements that no site other than the SODO site is acceptable to them. *See* Complaint, ¶ 37; Motion at 22. Local 19 believes that political pressure will cause the City to proceed with a SODO arena regardless of what the EIS reveals. Motion at 2, 22.

Only through speculation can Local 19 convert this alleged political momentum into injury *in fact*. Local 19's own words recognize the contingency of its allegation. The Complaint alleges that political momentum "could very well" or "will more likely than not" carry the

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project forward. *See* Complaint, ¶¶ 14, 37. Local 19's motion hedges even more, framing its core allegation as a question: "can anyone reasonably say that, after a perfunctory EIS is completed, members of the Seattle and King County Councils would not be under tremendous political pressure to vote for siting the Arena in SODO?" Motion at 22. Local 19 evidently believes it has a crystal ball capable of revealing a clear answer to that question.

But a different crystal ball yields a different forecast. Given that the parties drafted the MOU specifically to reserve the City's final decision until after the City Council considers the results of SEPA review, and assuming a greater level of integrity on the part of City decisionmakers than Local 19 appears to assume, one can envision the City ultimately deciding not to proceed with a SODO arena.

When it comes to discerning injury *in fact*, this Court should not choose between competing crystal balls. Shifting political winds and new circumstances confound any prediction about the alleged momentum of projects that involve a public role, as the corpses of such once-vaunted initiatives as the Monorail and the Seattle Commons bear witness.

What deprives Local 19 of standing is its reliance on *any* crystal ball, no matter its professed accuracy. Because such an approach is inherently speculative, Local 19 cannot establish concrete "injury in fact" and cannot demonstrate its standing to maintain this action.

B. If the Court reaches the merits, the Court must dismiss this lawsuit because the MOU is not an "action" for which SEPA review was required.

1. The MOU is not an "action" within the meaning of SEPA.

The City did not have to conduct SEPA review before approving the MOU. SEPA review includes a "threshold determination" as to whether an environmental impact statement ("EIS") is required and, if an EIS is required, preparation of an EIS. SEPA review is required only for a proposed "action." WAC 197-11-310(1) (a threshold determination "is required for

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any proposal which meets the definition of action and is not categorically exempt. . ."); WAC 197-11-330 (EIS is required for "proposals for legislation and other major actions significantly affecting the quality of the environment."). Unless and until an agency takes an "action," SEPA bars any judicial review of SEPA compliance. RCW 43.21C.075(6)(c) (judicial review "shall without exception be of the governmental action together with its accompanying environmental determinations"); *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 249-51, 857 P.2d 1039 (1993).

Local 19's claim therefore hinges on the definition of "action." "Actions" include "[n]ew and continuing activities. . . entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies." WAC 197-11-704(1)(a). Actions fall within one of two categories—the relevant category here being "project actions," which SEPA restricts to an enumerated list of *decisions*:

> A project action involves a *decision* on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and *are limited to* agency *decisions* to:
>
> > i. License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract;
> >
> > ii. Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

WAC 197-11-704(2)(a) (emphasis added).

Local 19's claim fails because the MOU is not an "action" within the meaning of SEPA. Although the MOU contemplates such *potential future* "actions" as helping fund an arena, purchasing real property for an arena, and ground leasing that property to a private party to construct an arena, the MOU contains no *decision* to take such actions. It does not, for example, commit the City to invest in an arena or buy or lease property. The MOU expressly reserves any

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such decision for a later day—a day that can dawn only after the completion of SEPA review. Because the MOU contains no actual decision to license, fund, or undertake an activity or to purchase, sell, or lease land, the MOU itself is not an "action" under SEPA.

This conclusion is consistent with SEPA's provisions regarding the proper timing of SEPA review. SEPA requires consideration of environmental information to be completed "before an agency *commits* to a particular course of action. . ." WAC 197-11-055(2)(c) (emphasis added). "A major purpose of the environmental review process is to provide environmental information to governmental decisionmakers for consideration *prior to making their decision* on any action. . ." SMC 25.05.055.B.2 (emphasis added, text set forth in the Appendix). *Accord* RCW 43.21C.075(1) ("a major purpose of [SEPA] is to combine environmental considerations with public decisions"). SEPA therefore recognizes that "[p]reliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis." WAC 197-11-055(2)(a)(ii). Of particular note, prior to SEPA review, SEPA "does not preclude developing plans or designs, issuing requests for proposals (RFPs), securing options, or performing other work necessary to develop an application for a proposal," as long as such activities do not have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070(4).

The MOU is the sort of preliminary step or option that the City may take or secure prior to completing SEPA review. The MOU gives the City the option of investing in an arena, on certain financial terms and conditions, *if* the City decides it wishes to do so after it is informed of the environmental ramifications. Crucially, the MOU *does not commit* the City to a particular course of action prior to completion of SEPA review. Rather, by its terms, the MOU provides that SEPA review must occur before the City takes any of the potential actions contemplated by

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the MOU, and the obligations of the City under the MOU are expressly conditioned on the City considering the SEPA review and deciding whether investing in a SODO arena is appropriate based on the SEPA review. *See* MOU, ¶¶ 5, 24.b.

Moreover, because the MOU reserves any decision to proceed until after an EIS has been prepared, the MOU is consistent with the principle that, prior to SEPA review, no action shall be taken by a governmental agency that would have an adverse environmental impact or limit the choice of reasonable alternatives. WAC 197-11-070(1). Far from limiting the City's choices, the MOU places no limitations on the City's discretion in deciding whether to proceed with this proposal, or any other, after considering the results of environmental review.

Allowing an agreement like the MOU to precede SEPA review makes sense in light of the practical realities facing a government agency and a private entity in a project of this sort. In theory, the City could have prepared an EIS, at the City's expense and based on a vague concept of ArenaCo's proposal for a SODO arena, without negotiating the MOU. But such an exercise would have lacked the benefit of the more specific arena concept that now exists and, more fundamentally, would have risked a substantial waste of the public's time and money on *environmental* review absent knowing that there were *financial* terms available that would support a City decision to invest public money. Negotiating the MOU allowed the City to obtain assurance on that score, thereby ensuring that environmental review would be performed on a proposal that has a meaningful prospect of being "real."

Similarly, a private party pursuing a project with a potential public financial role would justifiably hesitate to devote the time, and spend the substantial amount of money, required for EIS preparation with no assurance about the financial terms of the deal it would be making if the government decided to proceed following environmental review. To prevent such a private party

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from agreeing, prior to SEPA review, to a framework to govern the parties' potential financial relationship would be to inhibit private parties from pursuing projects in which there is a public role. This would be an unfortunate result for public agencies, whose flexibility in deploying public funds in the public interest would be significantly reduced. SEPA does not command that result.

2. Caselaw confirms that SEPA review was not required before the parties entered the MOU.

Federal caselaw under the National Environmental Policy Act ("NEPA") makes clear that environmental review is not required prior to entering an agreement such as the MOU.[3] The operative language of SEPA and NEPA concerning environmental review is essentially identical.[4] Like SEPA, NEPA's implementing regulations require agencies to integrate the environmental review process with other planning at the earliest possible time. 40 C.F.R. § 1501.2. Federal courts evaluating the timing of environmental review have interpreted these regulations as requiring agencies to prepare NEPA documents, such as an Environmental Assessment ("EA") or an EIS, "before any irreversible and irretrievable commitment of resources." *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (quoting *Conner v. Burford*,

[3] Given the similarity in the language of SEPA and NEPA, Washington courts recognize that they may look to federal cases construing and applying provisions of NEPA for guidance in SEPA cases. *See Eastlake Community Council v. Roanoke Assoc.*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973).

[4] SEPA requires that an EIS be prepared on "proposals for legislation and other major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). NEPA requires an EIS for "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332(2)(C).

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848 F.2d 1441, 1446 (9th Cir. 1988)).[5] This standard arises from language in NEPA that is also contained in SEPA.[6]

Under this standard, the Ninth Circuit has recognized that an agency does not irreversibly commit resources where it retains the authority to change course or to alter the plan it was considering implementing. *Center for Environmental Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1003-04, 1007 n.3 (9th Cir. 2011), involved an MOU through which agencies agreed to divert water from a lake, contingent on future compliance with NEPA. The court held that the MOU did not involve the irretrievable commitment of resources, and could occur prior to environmental review, because the MOU was contingent on NEPA compliance. *Id.* at 1007 n.3.

Other Ninth Circuit caselaw also supports the concept that agencies may, before conducting environmental review, enter agreements like the one in this case. For example, the preparation, prior to environmental review, of a memorandum contemplating the amendment of a road density standard for timber sale projects did not constitute an irreversible and irretrievable commitment of resources where the memorandum left the Forest Service free to ultimately decide not to amend the standard. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 892-93 (9th Cir. 2002). Likewise, the development, prior to environmental review, of an operating schedule to plan for a long-term timber sale contract did not constitute an irreversible and irretrievable commitment of resources where the government retained absolute authority to

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[5] Under NEPA, the purpose of an EA is to determine whether to prepare an EIS or to issue a FONSI (a Finding of No Significant Impact). *Metcalf*, 214 F.3d at 1143. In other words, the EA stage under NEPA is equivalent to the threshold determination stage under SEPA.

[6] *See Conner v. Burford*, 848 F.2d 1441, 1446 n.13 (9th Cir. 1988); *compare* 42 USC 4332(2)(C)(v) and RCW 43.21C.030(2)(c)(v).

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decide whether the activities contemplated by the schedule would ever take place. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir 1998).

By contrast, the Ninth Circuit found an irreversible and irretrievable commitment of resources where, prior to completion of environmental review, agencies entered an agreement to support a tribal whaling quota. *Metcalf*, 214 F.3d at 1143. The agreement was not contingent on NEPA compliance; rather, had the agencies "found after signing the Agreement that allowing the [tribe] to resume whaling would have a significant effect on the environment, the Federal Defendants would have been required to prepare an EIS, and *they may not have been able to fulfill their written commitment to the Tribe. As such, [the subject agency] would have been in breach of contract.*" *Id.* at 1144 (emphasis added).

Local 19's case is like *Center for Environmental Law* and unlike *Metcalf*. The arena MOU is contingent on SEPA review. If, after considering the information revealed by the SEPA review, the City opted not to proceed with an arena in SODO, the City would not be in breach of the MOU. Rather, the SEPA contingency would not be satisfied and the City would have no further obligation.

3. Local 19's arguments that SEPA review was required lack any legal basis or are irrelevant.

a. Local 19 errs in contending that SEPA review was required because the MOU creates "momentum."

Local 19 contends that SEPA review was required prior to the MOU because the MOU will "result in virtually unstoppable political momentum to approve the Arena on the SODO site," such that "the EIS will be little more than a costly ritual without real practical effect." Motion at 2. SEPA contains no test for the existence of an "action" based on the creation of

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"momentum" for future activities.[7] Rather, Local 19's contention rests on two cases that are fundamentally distinguishable: *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 860 P.2d 1024 (1993), and *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190 (2010).

King County involved approval of two annexations by a boundary review board following the issuance of a SEPA DNS. *King County*, 122 Wn.2d at 657. Importantly, *King County* did not involve an allegation, like the one now raised by Local 19, of whether an "action" existed that required prior SEPA review. No one questioned that the board's approval was an "action." Instead, the question was whether that action would have a *significant* adverse environmental impact such that the DNS was improper and a full EIS was required. In ruling that an EIS was required, the court, in the passage now invoked by Local 19, turned back a counter-argument by noting the potential for one action to create momentum for future actions. *Id.* at 664. *King County* holds no lesson for this case, where no "action" has occurred and there is no debate about whether an EIS will be required for the eventual future decision on whether to proceed with the proposed SODO arena.[8]

In *Magnolia*, the City approved a redevelopment plan for a former military base without performing SEPA review. *Magnolia*, 155 Wn. App. at 311. The court held that the City's approval of the plan constituted an "action" requiring prior SEPA review because the plan "will bind the City's use of the property upon federal approval." *Id.* at 308-9, 317. The MOU in this

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[7] Local 19 contends that "SEPA should be liberally construed." Motion at 11-12. While Washington courts have stated that "SEPA be given a broad and vigorous construction," *Eastlake Community Council*, 82 Wn.2d at 490, this principle does not come into play in this case. SEPA's definition of "action" is clear. In this case, Local 19 does not parse unclear statutory language, but rather makes an argument (regarding "momentum") that is unmoored from any language appearing in SEPA.

[8] Further limiting *King County*'s import is the fact that the Legislature immediately overruled it by exempting annexations from SEPA review. Laws of 1994, ch. 216, § 19 (enacting RCW 43.21C.222).

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case is fundamentally different: although the MOU is a binding contract, the City's obligation under that contract is contingent on the City's unfettered decision whether to proceed following SEPA review. As such, nothing in *Magnolia* suggests that the MOU could be an "action" requiring prior SEPA review, especially by virtue of creating "momentum."

b. Local 19 may not obtain judicial review of whether the City should have started SEPA review earlier, when a "proposal" existed.

Although the determinative legal issue in this case is whether the MOU constitutes an "action" under SEPA, Local 19's motion virtually ignores whether the MOU is an "action" and focuses instead on the existence of a "proposal."[9] Local 19 suggests that a "proposal" existed in spring 2011 when ArenaCo first approached the City. Motion at 17. Local 19 then cites the following provision of the SEPA rules:

> **Timing of Review of Proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

WAC 197-11-055(2). Local 19 contends that this provision required the City to undertake SEPA review "*before* entering into extensive private negotiations and certainly before entering into" the MOU. Motion at 18 (emphasis in original).

Even if a "proposal" existed prior to the parties entering the MOU, that would not enable Local 19 to maintain this suit. Under SEPA, if an agency has not yet taken an "action," there is no right to judicial review. Judicial review "shall without exception be of the governmental *action* together with its accompanying environmental determinations." RCW 43.21C.075(6)(c) (emphasis added). The purposes of this limitation are to preclude judicial review of SEPA

[9] Under SEPA, "proposal" means a "proposed action." WAC 197-11-784.

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compliance before an agency has taken final action, foreclose multiple lawsuits challenging a single agency action, and deny the existence of "orphan" SEPA claims unrelated to any government action. *State ex rel. Friend & Rikalo Contractor*, 122 Wn.2d at 251.[10] Given that SEPA draws a bright line at the time of agency "action," and that the City has taken no "action" regarding the proposed arena, this Court need not wade into the morass of attempting to determine how early is "early enough" for SEPA review to occur. Even if the Court determined that SEPA review had not occurred "early enough," the Court could not provide effective relief, beyond reminding the agency to perform SEPA review prior to taking action.

This case illustrates the practical problems with Local 19's "proposal"-based approach. Even Local 19 seems unsure of the point when the City allegedly should have commenced SEPA review. Local 19 first states that a "proposal" existed when Mr. Hansen approached the Mayor, then claims that the City was required to begin SEPA review "*before* entering into extensive private negotiations and certainly before entering into a binding MOU." Motion at 18 (emphasis in original). This is as clear as mush. Was SEPA review required the first time Mr. Hansen communicated with anyone at the City? If not, what magic words would have triggered review? When do "negotiations" begin and when do they become "extensive"?

Local 19's suggestion that SEPA review was required when Mr. Hansen first approached the Mayor illustrates the extent to which Local 19's approach is divorced from reality. Essentially, Local 19 suggests that, when a private party calls a public official about the possibility of a public participation in a venture, the official must say, in effect: "That's an interesting concept, but I need to sink the public's money into an EIS even before we discuss the

[10] Indeed, because the City has taken no "action," the Court could and should dismiss this lawsuit on the basis that it is unripe.

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details of your proposal or whether it's financially realistic, so call me back in a year or so after the EIS is done and we have finished the litigation over its adequacy and we can talk more then." Under such an approach, it is hard to imagine that many EISs for such amorphous proposals would provide useful information, or that many private entities would be willing to pursue projects involving public participation.

In sum, the fact that the MOU is not an "action" requires dismissal of Local 19's lawsuit. Local 19 is not entitled to raise a separate issue as to whether, if the MOU is not an action, the City nonetheless should have commenced SEPA review earlier.

c. Local 19's claim that City officials will make a biased decision to proceed with a SODO arena reflects a misunderstanding of SEPA's purpose.

In bringing this lawsuit, Local 19 wants to "force the City to review alternative locations for a proposed new sports arena without a bias in favor of the SODO location." *See* Complaint, ¶ 39. Local 19's claim about the alleged bias of City decisonmakers betrays a fundamental misunderstanding of SEPA's purposes. "SEPA is primarily a procedural statute that requires the disclosure of environmental information. SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration." *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007) (internal citations and quotations omitted).

Local 19 appears to recognize this when conceding that "SEPA itself does not compel environmentally wise choices." Motion at 12. But the level of scrutiny Local 19 seemingly would apply to the motives and thought processes of City officials in making a future decision regarding a SODO arena suggests that Local 19 views SEPA as forcing bias-free, impartial agency decisions. Environmental review statutes like SEPA and NEPA do not require agency

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officials to be "subjectively impartial"; the statutes require only that projects be objectively evaluated. *See Metcalf,* 214 F.3d at 1142.

d. The arena's status as a "private" or "public" project and the number of alternatives evaluated in the EIS are not relevant issues at this time.

Local 19 devotes a large portion of its motion to contending that the arena is a "public" rather than a "private" project. Motion at 14-17. The "public" versus "private" distinction is irrelevant to whether the MOU is an "action" under SEPA. Rather, the public/private distinction bears on the question of what alternatives must be considered in an EIS.[11] Local 19 contends that the arena EIS will not discuss the alternatives required by the project's alleged "public" nature. Motion at 22-24. That premature argument rests on an incorrect reading of the MOU.

Local 19 repeatedly contends that the MOU "specifies that only *one* alternative site—at the Seattle Center—will be considered as an alternative site" in addition to a "no action" alternative. Motion at 9, 23 (emphasis in original). This is incorrect. The MOU states that "the City and County will complete a full SEPA review, including consideration of *one or more* alternative sites." *See* MOU, ¶ 5 (emphasis added). The MOU states that the "City and County *anticipate* that the alternatives considered as part of the SEPA review will include a 'no action' alternative and an alternative site at Seattle Center." *Id.* (emphasis added). The MOU does not limit the alternatives to those two. The MOU unequivocally reserves the City's ability to evaluate more than one alternative site. *See* MOU, ¶ 2 (the City and County will evaluate the SODO location "and one or more alternative sites, and a 'no action' alternative as part of the

[11] The key provision of the SEPA regulations cited by Local 19, WAC 197-11-440, relates to "EIS contents." WAC 197-11-440(5)(d) provides that "[w]hen a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no-action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site. . ."

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SEPA review"). Thus, by its express terms, the MOU contains no limit on the number of alternative sites evaluated in the EIS and allows the EIS to evaluate whatever alternatives might be necessary or appropriate. Local 19 also errs in suggesting that the City has made a regulatory decision that the EIS shall encompass an alternative only at Seattle Center (plus a "no action" alternative). Motion at 9. Local 19 relies on the City's "Determination of Significance and Scoping Notice," but like the MOU, that document does not limit the alternatives that may be evaluated in the EIS.[12] Indeed, regardless of the language in the Scoping Notice (which started the scoping process), alternatives could be added during the EIS process.

Moreover, Local 19 mischaracterizes a provision in the SEPA regulations, which states that "[a]gencies are *encouraged* to describe public or nonproject proposals in terms of objectives rather than preferred solutions. . ." WAC 197-11-060(3)(iii) (emphasis added). Local 19 incorrectly asserts that this provision "requires" or "directs," rather than merely "encourages," proposals for public projects to be described in terms of objectives. Motion at 14-15, 24.

In the end, any judicial evaluation of the adequacy of the yet-to-be-completed EIS is premature. Arguments about whether the arena is a "public" or "private" project, whether the EIS appropriately discusses alternatives, or how the EIS describes the proposal must await an appeal of the adequacy of the EIS, following completion of the EIS. This Court should decline to entertain Local 19's arguments about those issues now.

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[12] The Scoping Notice states: "The EIS shall discuss alternatives including the proposed action and one *or more* potential alternatives, and a No Action alternative. In addition to the proposed SoDo site, the *initial* list of alternatives includes one or more sites at Seattle Center. *Additional* reasonable alternatives shall include actions that could feasibly attain or approximate the proposal's objective, but at a lower environmental cost." Declaration of Peter Goldman, Ex. P (emphasis added.)

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VI. CONCLUSION

Local 19 lacks standing to bring this lawsuit because Local 19 can only speculate about how the MOU will injure its members. On the merits, the MOU is not an "action" under SEPA requiring prior SEPA review. The City requests that the Court deny Local 19's motion for summary judgment and grant the City's motion for summary judgment dismissing Local 19's lawsuit. *See* CR 56(c).

Respectfully submitted this 23rd day of January, 2013.

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APPENDIX
Text of SMC 25.05.055.A and B

Because the City's SEPA rules (SMC Chapter 25.05) are virtually identical to the Department of Ecology's SEPA rules (WAC Chapter 197-11), this brief cites to the WAC where the City's rules are identical, and to the SMC in the one instance where the City's rules differ: SMC 25.05.055.B.2. This Appendix provides the full text of SMC 25.05.055.A and B, using bold font to highlight the Seattle-specific text in Subsection B.2.

SMC 25.05.055 Timing of the SEPA process.

A. Integrating SEPA and Agency Activities. The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

B. Timing of Review of Proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decisionmaking process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

1. A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one (1) or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.

a. The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

b. Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

2. **A major purpose of the environmental review process is to provide environmental information to governmental decisionmakers for consideration prior to making their decision on any action. The actual decision to proceed with any actions may involve a series of individual approvals or decisions.** Agencies may also organize environmental review in phases, as specified in Section 25.05.060 E.

3. Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (Section 25.05.070).

4. The City of Seattle, planning under the State Growth Management ACT (GMA), is subject to additional timing requirements (see Section 25.05.310).

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed a copy of the following documents:

1. Notice for Hearing; and

2. City of Seattle's Cross-Motion for Summary Judgment and Response to Local 19's Motion for Summary Judgment

with the Clerk of the Court using the ECR system.

I further certify that on this date, I used the E-Service function of the ECR system, which will send notification of this filing to:

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the foregoing being the last known address of the above-named parties.

Dated this 23rd day of January, 2013, at Seattle, Washington.

Rosie Lee Hailey

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